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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 699

BEATRICE L. GOLDSTONE AND EUGENE L. BONDY, EXECUTORS OF THE ESTATE OF MORRIS L. GOLDSTONE, DECEASED, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 20–26) is reported in 52 F. Supp. 704, and that of the Circuit Court of Appeals (R. 36–40) is reported in 144 F. 2d 373.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 28, 1944 (R. 40). The petition for a writ of certiorari was filed on

November 24, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Decedent, under contracts purchased from an insurance company but which concededly did not involve life insurance, was entitled to and received semi-annual annuity payments during his lifetime and had a contingent reversionary interest in the contracts if he survived his wife. The wife possessed but did not exercise all of the incidents of ownership in the contracts, including the right to terminate decedent's interest therein. The question is whether the proceeds of the contracts paid upon decedent's death are includible in his gross estate under Section 302 (c) of the Revenue Act of 1926, as amended.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set forth in the Appendix, *infra*, pp. 8–13.

STATEMENT

The pertinent facts found by the District Court (R. 27–28) and stipulated by the parties (R. 10–13) may be summarized as follows:

On June 29, 1933, the decedent purchased two contracts from the Equitable Life Assurance Society of the United States for the aggregate amount of $26,500 (R. 12). One contract, for which a

single premium of $14,357.08 was paid, insured decedent's life for $18,928, payable upon death to his wife, or if she predeceased him, to their daughters. If all the beneficiaries predeceased decedent, the proceeds of the contract were to be paid to his executors or administrators. (R. 12, 21.)

A physical examination was not required of the decedent in connection with this contract. Instead, he was required to purchase the second contract which was designated an annuity contract. (R. 12.) A single premium of $12,142.92 was paid. This contract provided for semi-annual payments of $386.51 to be made to the decedent during his lifetime and for payment of $6,071.46 to his wife upon his death, or if she predeceased him, to the daughters, and if they were dead, to his estate. (R. 12, 21.)

Each of the contracts provided that the wife should possess all of the incidents of ownership therein, including the right to assign or surrender them and change beneficiaries. If the wife died before the decedent, these powers were to vest in him. (R. 12, 21.) It was conceded that the two contracts were not contracts of life insurance (R. 22).

The decedent was sixty-three years of age when the contracts were purchased (R. 21). He died on February 23, 1938, survived by his wife and daughters (R. 10). His wife had not surrendered, assigned or alienated either contract prior to his death (R. 12).

Upon the death of the husband, the Equitable Life Assurance Society paid the widow $6,071.46 under the annuity contract, $18,928 under the life contract and $182.24 as accumulated dividends, or a total of $25,181.70 (R. 16, 20, 37).

The Commissioner of Internal Revenue determined that the proceeds of the two contracts were includible in decedent's estate for estate tax purposes. A deficiency of $5,376.11 was assessed and paid. A claim for refund was filed. Upon rejection a suit for refund was brought in the District Court, and its decision sustaining the action of the Commissioner was affirmed by the Circuit Court of Appeals. (R. 37, 40.)

ARGUMENT

1. The Circuit Court of Appeals properly concluded that the two contracts issued by the Equitable Life Assurance Society, which concededly were not contracts of life insurance under *Helvering* v. *Le Gierse,* 312 U. S. 531, were transfers intended to take effect in possession or enjoyment at or after death within the meaning of Section 302 (c) of the Revenue Act of 1926, as amended (Appendix, *infra,* pp. 8–9) and as construed by *Helvering* v. *Hallock,* 309 U. S. 106.

While it is true that the decedent's wife had the power to change the beneficiaries or to surrender or assign the contracts and thus both terminate decedent's annuity payments and end his contingent reversionary interest, these rights

were never exercised. Moreover, the trial court found (R. 24) that it was not the purpose of the decedent in purchasing the contracts to have his wife exercise any of her rights prior to his death.[1] In any event, the possibility that the wife might exercise her right to terminate the reversionary interest was merely an additional factor affecting the contingent right of the decedent to regain control over the contracts and his investment therein. The application of the *Hallock* doctrine does not depend upon the degree of contingency or the remoteness of vesting or revesting. *Commissioner* v. *Washer,* 127 F. 2d 446 (C. C. A. 6th), certiorari denied, 317 U. S. 653.

2. The decision of the Circuit Court of Appeals can be sustained without reliance upon *Helvering* v. *Hallock.* The contracts, which must be viewed as a unit under *Helvering* v. *Le Gierse,* provide for semi-annual payments to the decedent of $386.51 during his lifetime. While the wife could have deprived her husband of the payments, this was not done. The decedent received the payments until his death in 1938. Therefore, since the contracts were issued in 1933 (cf. *Hassett* v. *Welch,* 303 U. S. 303), this case comes literally within the provision added to Section 302 (c) of the Revenue Act of 1926 by the Joint Resolution of March 3, 1931, as amended by Sec-

[1] Had the wife surrendered the contracts prior to decedent's death, she would have received $5,376.11 less than the amount she actually received at his death (R. 37).

tion 803 of the Revenue Act of 1932, pursuant to which transferred property is included in the gross estate where the transferor "retained * * * for any period which does not in fact end before his death * * * the right to the income from * * *" the property transferred.[2] (Appendix, *infra*, pp. 8–9.)

3. Although it is felt that the Circuit Court of Appeals properly considered the present case to be controlled by *Helvering* v. *Hallock*, the court reached a contrary conclusion with respect to similar facts in *Estate of Ballard* v. *Commissioner*, 47 B. T. A. 784, affirmed, 138 F. 2d 512 (C. C. A. 2d), where the husband's contingent reversionary interest could likewise have been terminated by the exercise of the wife's undisputed control over the trust property. The Commissioner acquiesced in the *Ballard* decision. 1944–15 Int. Rev. Bull. 1.

In this respect, the instant case is in harmony with *Bailey* v. *United States*, 31 F. Supp. 778 (C. Cls.), certiorari dismissed, 311 U. S. 721, but it is inconsistent with *Lloyd* v. *Commissioner*, 141 F. 2d 758 (C. C. A. 3d), where the court held the transfer not within the scope of the statute because the grantor's reversionary interest could have been defeated by action of the beneficiary.

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[2] This point of view was presented to the Circuit Court of Appeals by the Government although no mention thereof was made in the decision.

Similar questions are now pending before this Court in *Fidelity-Philadelphia Trust Co.* v. *Rothensies*, 142 F. 2d 838 (C. C. A. 3d), No. 263, this Term, and *Field's Estate* v. *Commissioner*, 144 F. 2d 62 (C. C. A. 2d), No. 578, this Term, which are to be argued in January 1945. However, those cases do not involve the exact question here presented as to the effect of a provision whereby the grantor's reversionary interest may be defeated by action of the beneficiary.

CONCLUSION

In view of the inconsistent decisions and the administrative difficulties, it is believed that an authoritative determination should be obtained, and consequently we do not oppose the granting of a writ of certiorari.

Respectfully submitted.

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DECEMBER 1944.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302 [as amended by Section 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680]. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—

* * * * *

(c) [as amended by Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516, and by Section 803 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169]. To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the

nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made, in contemplation of death within the meaning of this title.[1]

Treasury Regulations 80 (1937 ed.):

ART. 17 [as amended by T. D. 5008, 1940–2 Cum. Bull. 286, 287]. *Transfers conditioned upon survivorship.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer by the decedent prior to his death (other than a bona fide sale for an adequate and full consideration in money or money's worth) whereby and to the extent that the beneficial title to the property transferred (if the transfer was in trust), or the legal title thereto (if the transfer was otherwise than in trust), is not to pass from the decedent to the donee unless the decedent dies before the donee or another person, or its passing is otherwise conditioned upon decedent's death; or, if title passed to the donee, it is to be defeated and the property is to revert to the decedent as his own should he survive the donee or another person, or the reverting of the property to the decedent is conditioned upon some other contingency terminable by his death. Since in such transfers the decedent's death is requisite to a termination of his

[1] The italicized portion represents the amendment made by the Joint Resolution of March 3, 1931, as amended by Section 803 of the Revenue Act of 1932.

interest in the property, it is unimportant whether his interest be denominated a reversion or a possibility of reverter, whether it arose by implication of law or by the express terms of the instrument of transfer, and whether the interest of the donee be contingent or vested subject to be divested; and the tax will apply, unless otherwise provided in the next succeeding paragraph, without regard to the time when the transfer was made, whether before or after the enactment of the Revenue Act of 1916. Thus, upon a transfer by a decedent of property in which an estate for life is given to one and an estate in remainder to another, but with a provision added that the estate in remainder shall revest in the decedent should he survive the owner of the life estate, there is to be included, in determining the value of the decedent's gross estate following his death, the value as of the date of his death of the estate in remainder, if the life estate is then outstanding. The value of the outstanding life estate is not to be included in determining the value of the gross estate, unless that estate had been transferred in contemplation of the decedent's death, or otherwise as to render it a part of the gross estate. If by reason of an election by the executor the valuation of the gross estate is governed by the provisions of article 11, adjustments in the values of such transferred estates may be required. (See article 15.)

Where the transfer was made during the period between November 11, 1935 (that being the date upon which the Supreme Court of the United States rendered its

decisions in the cases of *Helvering* v. *St. Louis Union Trust Co.* (296 U. S. 39 [Ct. D. 1047, C. B. XIV–2, 339 (1935)]) and *Becker* v. *St. Louis Union Trust Co.* (296 U. S. 48 [Ct. D. 1046, C. B. XIV–2, 337 (1935)]) and January 29, 1940 (that being the date upon which such Court rendered its decisions in *Helvering* v. *Hallock* and companion cases (309 U. S., 106 [Ct. D. 1440, C. B. 1940–1, 223]), and the Commissioner, whose determination therein shall be conclusive, determines that such transfer is classifiable with the transfers involved in such two cases decided on November 11, 1935, rather than with the transfer involved in the case of *Klein* v. *United States* (283 U. S., 231 [Ct. D. 333, C. B. X–1, 462 (1931)]), previously decided by such Court, then the property so transferred shall not be included in the decedant's gross estate under the provisions of this article, if the following condition is also met: Such transfer shall have been finally treated for all gift tax purposes, both as to the calendar year of such transfer and subsequent calendar years, as a gift in an amount measured by the value of the property undiminished by reason of a provision in the instrument of transfer by which the property, in whole or in part, is to revert to the decedent should he survive the donee or another person, or the reverting thereof is conditioned upon some other contingency terminable by decedent's death.

ART. 18 [as amended by T. D. 4868, 1938–2 Cum. Bull. 355]. *Transfers with possession or enjoyment retained.*—Except in the case of a bona fide sale for an adequate and full consideration in money or money's worth, the gross estate embraces

(section 302 (c), as amended) all property transferred by the decedent, whether in trust or otherwise, if he retained or reserved the use, possession, right to the income, or other enjoyment of the transferred property, and if the transfer was made—

(1) At any time after 10.30 p. m., eastern standard time, March 3, 1931, and such retention or reservation is for his life, or for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period; or

(2) At any time after 5 p. m., eastern standard time, June 6, 1932, and such retention or reservation is for any period mentioned in (1) or for any period not ascertainable without reference to his death.

A reservation for a "period not ascertainable without reference to his death" may be illustrated by a reservation of the right to receive, in quarterly payments, the income of the transferred property where none of the income between the last quarterly payment and decedent's death was to be received by him or his estate; or by a reservation of a life estate following a precedent estate for life or a term of years.

The use, possession, right to the income, or other enjoyment of the property, will be considered as having been retained by or reserved to the decedent to the extent that during any such period it is to be applied towards the discharge of a legal obligation of the decedent, or otherwise for his pecuniary benefit.

If such retention or reservation is of a part only of the use, possession, income, or other enjoyment of the property, then only a corresponding proportion of the value of the property should be included in determining the value of the gross estate.

(See article 15.)

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